

1 AMENDMENT TO HOUSE BILL 276

2 AMENDMENT NO. _____. Amend House Bill 276 by replacing
3 everything after the enacting clause with the following:

4 "Section 1. Short title. This Act may be cited as the
5 Tobacco Products Manufacturers' Escrow Enforcement Act of
6 2003.

7 Section 5. Findings; purpose. The General Assembly finds
8 that violations of the Tobacco Product Manufacturers' Escrow
9 Act threaten the integrity of the tobacco Master Settlement
10 Agreement, the fiscal soundness of the State, and the public
11 health. The General Assembly finds that enacting procedural
12 enhancements will help prevent violations and aid the
13 enforcement of the Tobacco Product Manufacturers' Escrow Act
14 and thereby safeguard the Master Settlement Agreement, the
15 fiscal soundness of the State, and the public health. The
16 provisions of this Act are not intended to and shall not be
17 interpreted to amend the Tobacco Product Manufacturers'
18 Escrow Act.

19 Section 10. Definitions. As used in this Act:

20 "Brand family" means all styles of cigarettes sold under
21 the same trade mark and differentiated from one another by

1 means of additional modifiers or descriptors, including, but
2 not limited to, menthol, lights, kings, and 100s and includes
3 any brand name (alone or in conjunction with any other word)
4 trademark, logo, symbol, motto, selling message, recognizable
5 pattern of colors, or any other indicia of product
6 identification identical or similar to, or identifiable with,
7 a previously known brand of cigarettes.

8 "Cigarette" has the same meaning in Section 10 of the
9 Escrow Act.

10 "Director" means the Director of Revenue.

11 "Distributor" has the same meaning prescribed in Section
12 1 of the Cigarette Tax Act, Section 1 of the Cigarette Use
13 Tax Act, and, in addition, means a distributor of
14 roll-your-own tobacco in accordance with Section 10-5 of the
15 Tobacco Products Tax Act of 1995, as appropriate.

16 "Escrow Act" means the Tobacco Product Manufacturers'
17 Escrow Act.

18 "Non-participating manufacturer" means any Tobacco
19 Product Manufacturer that is not a participating
20 manufacturer.

21 "Participating manufacturer" has the meaning given that
22 term in Section II(jj) of the Master Settlement Agreement and
23 all amendments thereto.

24 "Qualified escrow fund" has the same meaning as that term
25 is defined in Section 10 of the Escrow Act.

26 "Tobacco product manufacturer" has the same meaning as
27 that term is defined in Section 10 of the Escrow Act.

28 "Units sold" has the same meaning as that term is defined
29 in Section 10 of the Escrow Act.

30 Section 15. Certifications; directory; tax stamps.

31 (a) Every tobacco product manufacturer whose cigarettes
32 are sold in this State whether directly or through a
33 distributor, retailer, or similar intermediary or

1 intermediaries shall execute and deliver on a form prescribed
2 by the Attorney General a certification to the Attorney
3 General, no later than the thirtieth day of April each year,
4 certifying under penalty of perjury that, as of the date of
5 the certification, the tobacco product manufacturer either:
6 (i) is a participating manufacturer and has generally
7 performed its financial obligations under the Master
8 Settlement Agreement; or (ii) is in full compliance with the
9 Escrow Act, including all quarterly installment payments.

10 (1) A participating manufacturer shall include in
11 its certification a list of its brand families. The
12 participating manufacturer shall update the list 30 days
13 prior to any addition to or modification of its brand
14 families by executing and delivering a supplemental
15 certification to the Attorney General.

16 (2) A non-participating manufacturer shall include
17 in its certification a complete list of all of its brand
18 families: (i) separately listing brand families of
19 cigarettes and the number of units sold for each brand
20 family that were sold in the State during the preceding
21 calendar year; (ii) listing all of its brand families
22 that have been sold in the State at any time during the
23 current calendar year; (iii) indicating by an asterisk,
24 any brand family sold in the State during the preceding
25 calendar year that is no longer being sold in the State
26 as of the date of the certification; and (iv) identifying
27 by name and address any other manufacturer of the brand
28 families in the preceding calendar year. The
29 non-participating manufacturer shall update the list 30
30 days prior to any addition to or modification of its
31 brand families by executing and delivering a supplemental
32 certification to the Attorney General.

33 (3) In the case of a non-participating
34 manufacturer, the certification shall further certify:

1 (A) that the non-participating manufacturer is
2 registered to do business in this State or has
3 appointed a resident agent for service of process
4 and provided notice thereof as required by item 4 of
5 subsection (a) of this Section;

6 (B) that the non-participating manufacturer
7 has (i) established and continues to maintain a
8 qualified escrow fund as that term is defined in
9 Section 10 of the Escrow Act, and (ii) executed a
10 qualified escrow agreement that has been reviewed
11 and approved by the Attorney General and that
12 governs the qualified escrow fund;

13 (C) that the non-participating manufacturer is
14 in full compliance with the Escrow Act and this
15 Section, and any regulations promulgated pursuant
16 thereto;

17 (D) the name, address and telephone number of
18 the financial institution where the
19 non-participating manufacturer has established the
20 qualified escrow fund required pursuant to Section
21 15 of the Escrow Act and all regulations promulgated
22 thereto;

23 (E) the account number of the qualified escrow
24 fund and sub-account number for this State;

25 (F) the amount the non-participating
26 manufacturer placed in the fund for cigarettes sold
27 in the State during the preceding calendar year,
28 including the dates and amount of each deposit, and
29 such evidence or verification as may be deemed
30 necessary by the Attorney General to confirm the
31 foregoing; and

32 (G) the amounts of and dates of any withdrawal
33 or transfer of funds the non-participating
34 manufacturer made at any time from the fund or from

1 any other qualified escrow fund into which it ever
2 made escrow payments pursuant to Section 15 of the
3 Escrow Act and all regulations promulgated thereto.

4 (4) A tobacco product manufacturer may not include
5 a brand family in its certification unless: (i) in the
6 case of a participating manufacturer, the participating
7 manufacturer affirms that the brand family is to be
8 deemed to be its cigarettes for purposes of calculating
9 its payments under the master settlement agreement for
10 the relevant year, in the volume and shares determined
11 pursuant to the master settlement agreement; and (ii) in
12 the case of a non-participating manufacturer, the
13 non-participating manufacturer affirms that the brand
14 family is to be deemed to be its cigarettes for purposes
15 of Section 15 of the Escrow Act.

16 Nothing in this Section shall be construed as
17 limiting or otherwise affecting the State's right to
18 maintain that a brand family constitutes cigarettes of a
19 different tobacco product manufacturer for purposes of
20 calculating payments under the master settlement
21 agreement or for purposes of Section 15 of the Escrow
22 Act.

23 (5) The tobacco product manufacturers shall
24 maintain all invoices and documentation of sales and
25 other information relied upon for certification for a
26 period of 5 years, unless otherwise required by law to
27 maintain them for a greater period of time.

28 (b) Not later than 6 months after the effective date of
29 this Act, the Attorney General shall develop and make
30 available for public inspection, through publishing on its
31 website, a directory listing all tobacco product
32 manufacturers that have provided current and accurate
33 certifications conforming to the requirements of subsection
34 (a) of Section 15 and all brand families that are listed in

1 the certifications, except for the following:

2 (1) The Attorney General shall not include or
3 retain in the directory the name or brand families of any
4 non-participating manufacturer that fails to provide the
5 required certification or whose certification the
6 Attorney General determines is not in compliance with
7 subsections (a)(2) or (a)(3) of Section 15, unless the
8 Attorney General has determined that the violation has
9 been cured to the satisfaction of the Attorney General.

10 (2) Neither a tobacco product manufacturer nor
11 brand family shall be included or retained in the
12 directory if the Attorney General concludes that: (i) in
13 the case of a non-participating manufacturer all escrow
14 payments required pursuant to Section 15 of the Escrow
15 Act for any period for any brand family, whether or not
16 listed by the non-participating manufacturer, have not
17 been fully paid into a qualified escrow fund governed by
18 a qualified escrow agreement that has been approved by
19 the Attorney General; or (ii) all outstanding final
20 judgments, including interest thereon, for violations of
21 Section 15 of the Escrow Act have not been fully
22 satisfied for that brand family and manufacturer.

23 (3) The Attorney General shall update the directory
24 as necessary in order to correct mistakes and to add or
25 remove a tobacco product manufacturer or brand families
26 to keep the directory in conformity with the requirements
27 of this Act.

28 (4) Every distributor shall provide and update as
29 necessary an electronic mail address to the Attorney
30 General for the purpose of receiving any notifications as
31 may be required by this Act.

32 (c) It shall be unlawful for any person: (i) to affix a
33 stamp to a package or other container of cigarettes of a
34 tobacco product manufacturer or brand family not included in

1 the directory or to sell, offer, or possess for sale in this
2 State; or (ii) import for personal consumption in this State,
3 cigarettes of a tobacco product manufacturer or brand family
4 not included in the directory.

5 Section 20. Agent for service of process.

6 (a) Any non-resident or foreign non-participating
7 manufacturer that has not registered to do business in this
8 State as a foreign corporation or business entity shall, as a
9 condition precedent to having its brand families listed or
10 retained in the directory, appoint and continually engage
11 without interruption the services of an agent in this State
12 to act as agent for the service of process on whom all
13 process, and any action or proceeding against it concerning
14 or arising out of the enforcement of this Act and the Escrow
15 Act, may be served in any manner authorized by law. The
16 service shall constitute legal and valid service of process
17 on the non-participating manufacturer. The non-participating
18 manufacturer shall provide the name, address, phone number,
19 and proof of the appointment and availability of the agent to
20 and to the satisfaction of the Director and Attorney General.

21 (b) The non-participating manufacturer shall provide
22 notice to the Director and Attorney General 30 calendar days
23 prior to termination of the authority of an agent and shall
24 further provide proof to the satisfaction of the Attorney
25 General of the appointment of a new agent no less than 5
26 calendar days prior to the termination of an existing agent
27 appointment. In the event an agent terminates an agency
28 appointment, the non-participating manufacturer shall notify
29 the Director and Attorney General of the termination within 5
30 calendar days and shall include proof to the satisfaction of
31 the Attorney General of the appointment of a new agent.

32 (c) Any non-participating manufacturer whose products
33 are sold in this State, without appointing or designating an

1 agent as herein required shall be deemed to have appointed
2 the Secretary of State as the agent and may be proceeded
3 against in courts of this State by service of process upon
4 the Secretary of State; however, the appointment of the
5 Secretary of State as an agent shall not satisfy the
6 condition precedent to having its brand families listed or
7 retained in the directory.

8 Section 25. Reporting of information; escrow
9 installments.

10 (a) Not later than 20 days after the end of each
11 calendar quarter, and more frequently if so directed by the
12 Attorney General, each distributor shall submit the
13 information as the Attorney General requires to facilitate
14 compliance with this Section, including, but not limited to,
15 a list by brand family of the total number of cigarettes or
16 in the case of roll-your-own, the equivalent stick count for
17 which the distributor affixed stamps during the previous
18 calendar quarter or otherwise paid the tax due for these
19 cigarettes. The distributor shall maintain, and make
20 available to the Attorney General, all invoices and
21 documentation of sales of all non-participating manufacturer
22 cigarettes and any other information relied upon in reporting
23 to the Attorney General for a period of 5 years.

24 (b) The Director is authorized to disclose to the
25 Attorney General any information received under this Act and
26 requested by the Attorney General for purposes of determining
27 compliance with and enforcing the provisions of this Act. The
28 Director and Attorney General shall share with each other the
29 information received under this Act, and may share the
30 information with other federal, State, or local agencies only
31 for purposes of enforcement of this Act, the Escrow Act, or
32 corresponding laws of other states.

33 (c) The Attorney General may require at any time, from

1 the non-participating manufacturer, proof from the financial
2 institution in which the manufacturer has established a
3 qualified escrow fund for the purpose of compliance with the
4 Escrow Act of the amount of money in the fund being held on
5 behalf of the State and the dates of deposits, and listing
6 the amounts of all withdrawals from the fund and the dates
7 thereof.

8 (d) In addition to the information required to be
9 submitted pursuant to this Act, the Attorney General may
10 require a distributor or tobacco product manufacturer to
11 submit any additional information including, but not limited
12 to, samples of the packaging or labeling of each brand
13 family, as is necessary to enable the Attorney General to
14 determine whether a tobacco product manufacturer is in
15 compliance with this Act.

16 (e) To promote compliance with the provisions of this
17 Act, the Attorney General may promulgate regulations
18 requiring a tobacco product manufacturer subject to the
19 requirements of subsection (a)(2) of Section 15 to make the
20 escrow deposits required in quarterly installments during the
21 year in which the sales covered by the deposits are made. The
22 Attorney General may require production of information
23 sufficient to enable the Attorney General to determine the
24 adequacy of the amount of the installment deposit.

25 Section 30. Penalties and other remedies.

26 (a) In addition to or in lieu of any other civil or
27 criminal remedy provided by law, upon a determination that a
28 distributor has violated subsection (c) of Section 15 or any
29 regulation adopted pursuant thereto, the Director may revoke
30 or suspend the license of any stamping agent in the manner
31 provided by Section 6 of the Cigarette Tax Act, Section 6 of
32 the Cigarette Use Tax Act, or Section 10-25 of the Tobacco
33 Products Tax Act of 1995, as appropriate. Each stamp affixed

1 and each offer to sell cigarettes in violation of subsection
2 (c) of Section 15 shall constitute a separate violation. For
3 each violation, the Director may also impose a civil penalty
4 in an amount not to exceed the greater of 500% of the retail
5 value of the cigarettes sold or \$5,000 upon a determination
6 of violation of subsection (c) of Section 15 or any
7 regulations adopted pursuant thereto.

8 (b) Any cigarettes that have been sold, offered for
9 sale, or possessed for sale in this State, or imported for
10 personal consumption in this State in violation of subsection
11 (c) of Section 15 shall be subject to seizure and forfeiture
12 as provided in Sections 18, 18a, and 20 of the Cigarette Tax
13 Act and Sections 24, 25, 25a and 26 of the Cigarette Use Tax
14 Act, and all cigarettes so seized and forfeited shall be
15 destroyed and not resold.

16 (c) The Attorney General may seek an injunction to
17 restrain a threatened or actual violation of subsection (c)
18 of Section 15, subsection (a) of Section 25, or subsection
19 (d) of Section 25 by a stamping agent and to compel the
20 stamping agent to comply with such subsections. In any action
21 brought pursuant to this Section, the State shall be entitled
22 to recover the costs of investigation, costs of the action,
23 and reasonable attorney fees.

24 (d) It shall be unlawful for a person to: (i) sell or
25 distribute cigarettes; or (ii) acquire, hold, own, possess,
26 transport, import, or cause to be imported cigarettes that
27 the person knows or should know are intended for distribution
28 or sale in the State in violation of subsection (c) of
29 Section 15. A violation of this Section shall be a Class 2
30 felony.

31 (e) A person who violates subsection (c) of Section 15
32 engages in an unfair and deceptive trade practice in
33 violation of the Uniform Deceptive Trade Practices Act.

1 Section 35. Miscellaneous provisions.

2 (a) A determination of the Attorney General to not list
3 or to remove from the directory a brand family or tobacco
4 product manufacturer shall be subject to review in the manner
5 prescribed by rule.

6 (b) No person shall be issued a license or granted a
7 renewal of a license to act as a distributor unless the
8 person has certified in writing, under penalty of perjury,
9 that the person will comply fully with this Section.

10 (c) The Attorney General may promulgate regulations
11 necessary to effect the purposes of this Act.

12 (d) In any action brought by the State to enforce this
13 Act, the State shall be entitled to recover the costs of
14 investigation, expert witness fees, costs of the action, and
15 reasonable attorney fees.

16 (e) If a court determines that a person has violated
17 this Act, the court shall order any profits, gain, gross
18 receipts, or other benefit from the violation to be disgorged
19 and paid to the General Revenue Fund.

20 (f) Unless otherwise expressly provided the remedies or
21 penalties provided by this Act are cumulative to each other
22 and to the remedies or penalties available under all other
23 laws of this State.

24 Section 40. Severability.

25 (a) If any provision of this Act or its application to
26 any person or circumstance is held invalid, the invalidity
27 does not affect other provisions or applications of this Act
28 that can be given effect without the invalid provision or
29 application.

30 (b) If a court of competent jurisdiction finds that the
31 provisions of this Act and of the Escrow Act conflict and
32 cannot be harmonized, then the provisions of the Escrow Act
33 shall control.

1 (c) If any Section, subsection, subdivision, paragraph,
 2 sentence, clause, or phrase of this Act (excluding the
 3 amendatory provisions of Section 300) causes the Escrow Act
 4 to no longer constitute a qualifying or model statute, as
 5 those terms are defined in the Master Settlement Agreement,
 6 then that portion of this Act shall not be valid.

7 (30 ILCS 169/Act rep.)

8 Section 200. The Tobacco Products Manufacturers' Escrow
 9 Enforcement Act is repealed.

10 Section 300. The Tobacco Product Manufacturers' Escrow
 11 Act is amended by changing Section 15 and by adding Section
 12 20 as follows:

13 (30 ILCS 168/15)

14 Sec. 15. Requirements.

15 (a) Any tobacco product manufacturer selling cigarettes
 16 to consumers within the State of Illinois (whether directly
 17 or through a distributor, retailer, or similar intermediary
 18 or intermediaries) after the effective date of this Act shall
 19 do one of the following:

20 (1) become a participating manufacturer (as that
 21 term is defined in Section II(jj) of the Master
 22 Settlement Agreement) and generally perform its
 23 financial obligations under the Master Settlement
 24 Agreement; or

25 (2) (A) place into a qualified escrow fund by April
 26 15 of the year following the year in question the
 27 following amounts (as such amounts are adjusted for
 28 inflation):

29 (i) For 1999: \$0.0094241 per unit sold
 30 after the effective date of this Act;

31 (ii) For 2000: \$0.0104712 per unit sold;

1 (iii) For each of 2001 and 2002:
2 \$0.0136125 per unit sold;

3 (iv) For each of 2003 through 2006:
4 \$0.0167539 per unit sold;

5 (v) For each of 2007 and each year
6 thereafter: \$0.0188482 per unit sold.

7 (B) A tobacco product manufacturer that places
8 funds into escrow pursuant to subdivision (a)(2)(A)
9 shall receive the interest or other appreciation on
10 the funds as earned. The funds themselves shall be
11 released from escrow only under the following
12 circumstances:

13 (i) to pay a judgment or settlement on
14 any released claim brought against the tobacco
15 product manufacturer by the State or any
16 releasing party located or residing in the
17 State. Funds shall be released from escrow
18 under this subdivision (a)(2)(B)(i): (I) in
19 the order in which they were placed into
20 escrow; and (II) only to the extent and at the
21 time necessary to make payments required under
22 such judgment or settlement;

23 (ii) to the extent that a tobacco product
24 manufacturer establishes that the amount it was
25 required to place into escrow on account of
26 units sold in the State in a particular year
27 was greater than the Master Settlement
28 Agreement payments, as determined pursuant to
29 Section IX(i) of that Agreement, including
30 after final determination of all adjustments,
31 that such manufacturer would have been required
32 to make on account of such units sold the
33 State's-allocable-share-of-the--total--payments
34 that-such-manufacturer-would-have-been-required

1 to---make---in---that---year---under---the---Master
2 Settlement-Agreement-(as-determined-pursuant-to
3 Section--IX(i)(2)--of--the--Master---Settlement
4 Agreement,-and-before-any-of-the-adjustments-or
5 offsets--described--in-Section-IX(i)(3)-of-that
6 Agreement-other-than-the-Inflation--Adjustment)
7 had it been a Participating Manufacturer, the
8 excess shall be released from escrow and revert
9 back to such tobacco product manufacturer; or

10 (iii) to the extent not released from
11 escrow under subdivisions (a)(2)(B)(i) or
12 (a)(2)(B)(ii), funds shall be released from
13 escrow and revert back to such tobacco product
14 manufacturer 25 years after the date on which
15 they were placed into escrow.

16 (C) Each tobacco product manufacturer that
17 elects to place funds into escrow pursuant to this
18 subdivision (a)(2) shall annually certify to the
19 Attorney General that it is in compliance with this
20 subdivision (a)(2). The Attorney General may bring
21 a civil action on behalf of the State of Illinois
22 against any tobacco product manufacturer that fails
23 to place into escrow the funds required under this
24 subdivision (a)(2). Any tobacco product
25 manufacturer that fails in any year to place into
26 escrow the funds required under this subdivision
27 (a)(2) shall:

28 (i) be required within 15 days to place
29 such funds into escrow as shall bring it into
30 compliance with this Section. The court, upon
31 a finding of a violation of this subdivision
32 (a)(2), may impose a civil penalty to be paid
33 into the General Revenue Fund in an amount not
34 to exceed 5% of the amount improperly withheld

1 from escrow per day of the violation and in a
2 total amount not to exceed 100% of the original
3 amount improperly withheld from escrow;

4 (ii) in the case of a knowing violation,
5 be required within 15 days to place such funds
6 into escrow as shall bring it into compliance
7 with this Section. The court, upon a finding
8 of a knowing violation of this subdivision
9 (a)(2), may impose a civil penalty to be paid
10 into the General Revenue Fund in an amount not
11 to exceed 15% of the amount improperly withheld
12 from escrow per day of the violation and in a
13 total amount not to exceed 300% of the original
14 amount improperly withheld from escrow; and

15 (iii) in the case of a second knowing
16 violation, be prohibited from selling
17 cigarettes to consumers within the State of
18 Illinois (whether directly or through a
19 distributor, retailer, or similar intermediary)
20 for a period not to exceed 2 years.

21 (b) Each failure to make an annual deposit required
22 under this Section shall constitute a separate violation. If
23 a tobacco product manufacturer is successfully prosecuted by
24 the Attorney General for a violation of subdivision (a)(2),
25 the tobacco product manufacturer must pay, in addition to any
26 fine imposed by a court, the State's costs and attorney's
27 fees incurred in the prosecution.

28 (Source: P.A. 91-41, eff. 6-30-99.)

29 (30 ILCS 168/20 new)

30 Sec. 20. If this amendatory Act of the 93rd General
31 Assembly or any portion of the amendment to subdivision
32 (2)(B)(ii) of subsection (a) of Section 15 made by this
33 amendatory Act of the 93rd General Assembly is held by a

1 court of competent jurisdiction to be unconstitutional, then
2 such subdivision (2)(B)(ii) of subsection (a) of Section 15
3 shall be deemed to be repealed in its entirety. If
4 subdivision (2)(B)(ii) of subsection (a) of Section 15 shall
5 thereafter be held by a court of competent jurisdiction to be
6 unconstitutional, then this amendatory Act of the 93rd
7 General Assembly shall be deemed repealed and subdivision
8 (2)(B)(ii) of subsection (a) of Section 15 shall be restored
9 as if no such amendments had been made. Neither any holding
10 of unconstitutionality nor the repeal of subdivision
11 (2)(B)(ii) of subsection (a) of Section 15 shall affect,
12 impair, or invalidate any other portion of Section 15 or the
13 application of such Section to any other person or
14 circumstance, and such remaining portions of Section 15 shall
15 at all times continue in full force and effect."